UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROGME CORPORATION, Plaintiff, vs. COMCAST CABLE COMMUNICATIONS, LLC, et al., Defendant.	Case No. 2:15-cv-13935-SJM-MJH District Judge Stephen J. Murphy, III Magistrate Judge Michael J. Hluchaniuk

COMCAST CABLE COMMUNICATIONS, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Comcast Cable Communications, LLC ("Comcast Cable") opposes, and requests that this Court deny, Progme Corporation's ("Progme") Motion for Leave to File a Second Amended Complaint for Patent Infringement (D.I. 35, "Motion") under Fed. R. Civ. P. 15(a)(2). According to the U.S. Supreme Court, leave under Rule 15(a)(2) should be denied when the proposed amendment would be futile, or the proponent has repeatedly failed to cure pleading defects. The present Motion should be denied for both of these reasons.

Dated: April 22, 2016

Respectfully submitted,

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COMCAST CABLE COMMUNICATIONS, LLC'S BRIEF IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT

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I. STATEMENT OF ISSUES PRESENTED

Pursuant to Local Rule 7.1(d)(2), Comcast Cable requests that the Court decide whether Plaintiff's Motion should be denied as a result of the futility of Progme's proposed amendments and its repeated failure to cure deficiencies in its prior complaints.

II. CONTROLLING AUTHORITY FOR RELIEF SOUGHT

The controlling authority for Comcast Cable's Motion is Rule 15(a)(2) of the Federal Rules of Civil Procedure. Additionally, jurisprudence from the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit construing and applying those authorities is controlling.

III. INTRODUCTION

Progme's Motion for leave to amend its complaint a second time should be denied as contrary to U.S. Supreme Court precedent. Such amendments should be entered only when "justice so requires." Fed. R. Civ. P. 15(a)(2). But Supreme Court precedent makes clear that justice does not require an amendment if it would be futile or if there were repeated failures to cure defects in the pleading. *Foman v. Davis*, 371 U.S. 178, 182 (1962). As to futility, Progme's proposed amendments fail to correct the multitude of deficiencies that Comcast Cable identified in its pending motion to dismiss. Therefore, the Court should deny Progme's Motion as futile. Furthermore, Progme has already had three opportunities to address the deficiencies Comcast Cable has raised, and its repeated failure to cure them not only demonstrates futility but also is an independent reason this Court should deny Progme's Motion.

IV. FACTUAL BACKGROUND

A. Before moving to file its second amended complaint, Progme had several opportunities to cure the many defects in its claims for relief but failed to cure any.

Progme filed its original complaint against various defendants, including Comcast Corporation (as opposed to current-defendant Comcast Cable), on Nov. 9, 2015, almost six months ago. D.I. 1. Prior to answering, Comcast Corporation's counsel (who also represents Comcast Cable here) explained to Progme's counsel that the original complaint failed to state a proper claim for relief as to its indirect, willful, and direct infringement claims. Ex. A (J. Lesovitz Decl.) ¶ 2. Progme refused to voluntarily amend its complaint to correct the defects, opting to instead wait until Comcast Corporation filed a motion to dismiss, which it did on February 3. *Id.* ¶ 3; D.I. 8, 9. The Court subsequently gave Progme "the opportunity to cure the purported pleading defects by granting it leave to file an amended complaint . . . ," without addressing the motion's merits. D.I. 10.

Progme then filed its first amended complaint, substituting Comcast Cable for Comcast Corporation, adding NBCUniversal Media, LLC ("NBCU"), and making very few substantive changes to the claims. Because the first amended complaint was as deficient as the original – failing to correct any of the defects raised in Comcast Corporation's motion to dismiss – Comcast Cable filed another motion to dismiss, raising the same issues as to Progme's indirect, willful, and direct infringement claims that Comcast Corporation previously raised. D.I. 30.

While Comcast Cable's motion was pending, Progme sought Comcast Cable's consent to file yet another amended complaint. Ex. A ¶ 4. Because Progme provided very little time to review the draft amended complaint and, in any event, did not correct the twice-previously-identified defects, Comcast Cable withheld consent. *Id.* ¶¶ 5-7.

B. The second amended complaint, like its earlier counterparts, fails to state a plausible claim for relief.

A comparison of Progme's first and second amended complaints is attached as exhibit B. Specifically, exhibit B shows through "tracked changes" how Progme edited the first amended complaint to arrive at the second amended complaint. And as shown, the second amended complaint still fails to correct the various defects identified in Comcast Cable's pending motion to dismiss.

Importantly, most amendments Progme made to the first amended complaint are unrelated to the issues Comcast Cable raised as to the indirect, willful, and direct infringement allegations. Many of the amendments are corrections to typographical and other apparent errors. *E.g.*, Ex. B ¶¶ 28, 31, 52-53, 59, 61-62, 77, 86, 94, 101-102, 109-110. Others mostly revise Progme's list of the allegedly infringed patent claims (*e.g.*, ¶¶ 62-74, 82, 90, 98, 106, and 114), add two paragraphs to the overview of the asserted patent section (*e.g.*, ¶¶ 35-36), and name NBCU as an alleged direct infringer (e.g., ¶¶ 50, 51, 59-61, 78, 87, 95, 97, 103-105, and 111-113). Progme made little attempt to fix the various pleading deficiencies that Comcast Cable (and, previously, Comcast Corporation) identified.

V. ARGUMENT

Because Progme's chance to amend its complaint as a matter of course has passed, Progme may amend its complaint only with this Court's leave. Fed. R. Civ. P. 15(a)(2). Although the Court should "freely give leave when justice so requires," the U.S. Supreme Court has held that leave should be denied if, among other reasons, the amendment would be futile or there was a repeated failure to cure defects in prior amendments. *Foman*, 371 U.S. at 182; *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001).

Here, Progme's proposed amendments are futile because they do not cure the numerous defects in its first amended complaint. Demonstrating such futility is Progme's repeated failure to cure those defects. Therefore, the Court should deny Progme's request for leave under Rule 15(a)(2).

A. Progme's second amended complaint would be futile because it fails to correct the various defects identified in Comcast Cable's pending motion to dismiss.

Progme's Motion should be denied because the amendments made in Progme's second amended complaint would be futile. As the Sixth Circuit explained, "[a]mendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss." *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005). Comcast Cable's pending motion to dismiss Progme's first amended complaint identifies various defects, and Progme's proposed amendments do nothing to correct them. D.I. 30. For this reason alone, the Court should deny Progme's Motion.

1. Progme's second amended complaint, like the first, fails to plead pre-suit knowledge of the asserted patent in support of its claim for indirect infringement.

Progme's second amended complaint would be futile because it still fails to plead sufficient facts showing that Comcast Cable had pre-suit knowledge of the asserted U.S. Patent No. 8,713,425 ("'425 patent"). Proof of indirect infringement requires proof of pre-suit knowledge of the patent-in-suit. *Id.* at 13 (citing *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015)). A complaint alleging indirect infringement must plead "sufficient facts . . . for the Court to infer that the defendants had knowledge of [the patent-in-suit] and that their products infringed on those patents." *JDS Techs., Inc. v. Avigilon USA Corp.*, 2015 WL 3603525, *2 (E.D. Mich. June 5, 2015). In its motion to dismiss, Comcast Cable explained that Progme failed to plead that Comcast Cable had such pre-suit knowledge. *Id.* § V.B.2. Progme's second amended complaint does not remedy this failure.

The only amendment concerning alleged prior knowledge of the '425 patent is contained in paragraph 123 of the second amended complaint. That paragraph alleges that Comcast Cable received actual notice of the patent "from service of [sic] Progme's First Amended Complaint on . . . Comcast [Cable]." As explained in Comcast Cable's motion to dismiss, however, naming a patent in a served complaint is not sufficient to support a claim of knowledge of the patent. D.I. 30 at 13-14. To properly plead indirect infringement, sufficient facts must be alleged showing that the defendant had knowledge of the asserted patent *before the lawsuit began*. *Addiction & Detoxification Inst. LLC v. Carpenter*, 2014 WL 3819349, *2 (E.D. Mich. Feb. 13, 2015) ("[T]he court must grant Defendants' motion to dismiss the indirect infringement claim, as Plaintiff has failed to state facts that allege that Defendants had knowledge of the '411 Patent *before this lawsuit* . . . .") (emphasis added), *aff'd*, *Addiction & Detoxification Inst. LLC v. Carpenter*, 620 Fed. Appx. 934 (Fed. Cir. 2015). Progme thus did not cure this knowledge defect through service of the first amended complaint.

Progme also argues that paragraphs 118-122 of its proposed second amended complaint demonstrate Comcast Cable's prior knowledge of the '425 patent. Mot. at 7. As shown in Exhibit B, however, none of those paragraphs were added as amendments to Progme's prior complaints and so they are irrelevant as to whether the Court should grant Progme's Motion here.

Nevertheless, none of those paragraphs demonstrate pre-suit knowledge anyway. In relying on paragraphs 118-121, Progme conflates two different legal concepts. Mot. at 7-8. The paragraphs relate to constructive *notice* of a patent under 35 U.S.C. § 287 for damage-calculation purposes based on patent marking. This statutory section has nothing to do with demonstrating actual *knowledge* of a patent underlying a charge of indirect infringement. *See* 35 U.S.C. § 287

("Limitation on damages and other remedies; marking and notice").[1]

Progme also cites *Philips Electronics N. America v. Remote Solutions*, 411 F. Supp. 2d 479, 483 (D. Del. 2006) in arguing that knowledge of an asserted patent may be established by "constructive" knowledge. Mot. at 7. However, that case does not stand for what Progme claims it does. *Philips* discussed constructive knowledge in the context of pleading that a defendant knew about a third party's activities, not whether the defendant had prior knowledge of an asserted patent. 411 F. Supp. 2d at 483 ("[T]he parties dispute centers on whether Philips must prove that the Defendants actually knew, or only that Defendants had reason to know, that the URCs that Defendants sold to Solectron were going to be resold in the United States."). When pleading that an accused infringer had pre-suit knowledge, the pleading must provide facts showing that it had actual, not constructive, knowledge of the patent-in-suit. *MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 232 n. 6 (D. Del. 2012) ("[A]ctual (*not constructive*) knowledge of the patent-in-suit is necessary to state a claim for indirect infringement . . . under *Global-Tech*, unless the patentee is claiming willful blindness") (emphasis added).

Paragraph 122 claims that Comcast Cable received actual knowledge of the asserted patent through service of the original complaint on its parent, Comcast Corporation. Progme, however, cites no authority supporting that knowledge of a parent corporation is imputed to its subsidiary, and Comcast Cable is aware of none. In any event, as explained above, pre-suit knowledge is required for indirect infringement, not knowledge arising from service of a complaint in the same litigation. *Addiction & Detoxification Inst.*, 2014 WL 3819349, at *2.

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[1] At least when preparing the complaint, Progme understood that constructive notice under § 287 is different than knowledge for indirect infringement. It discusses constructive notice under § 287 in the "Relief Warranted" section of its Complaint, rather than in sections dealing with liability (Counts I-VI).

Progme cites *Apeldyn Corp. v. Sony Corp.*, 852 F. Supp. 2d 568 (D. Del. 2012) in arguing that relevant knowledge can arise from a prior complaint. *See* Mot. at 8. But that case found prior knowledge based on a complaint from a different case filed over three years before the infringement action began. Thus, despite Progme's suggestion, *Apeldyn* did not hold that service of a complaint in the same litigation suffices to demonstrate prior knowledge.[2]

Accordingly, the indirect infringement allegations in Progme's second amended complaint are still inadequate because they omit any relevant fact showing Comcast Cable had pre-suit knowledge of the ’425 patent.[3]

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[2] Although one court in this district found induced-infringement allegations sufficient absent pre-suit knowledge of the patent, *see Serv. Sols. U.S., LLC v. Autel U.S. Inc.*, 2013 WL 5701063, at *9 (E.D. Mich. Oct. 18, 2013), this decision appears to be an outlier, given the Federal Circuit's affirmance in *Carpenter* and at least two other decisions in this district. Those two other decisions found pre-suit knowledge a requirement to sufficiently plead a claim for induced infringement. *See JDS Techs.*, 2015 WL 3603525, at *1-*2; *Addiction & Detoxification Inst., L.L.C. v. Aharonov*, 2015 WL 631959, at *2 (E.D. Mich. Feb. 13, 2015); *see also Proxyconn Inc. v. Microsoft Corp.*, 2012 WL 1835680, at *7 (C.D. Cal. May 16, 2012); *MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 232 (D. Del. 2012).

2. Progme’s second amended complaint, like the first, fails to plausibly allege specific intent or knowledge that any third-party act constituted direct infringement, both required to plead inducement.

To survive a motion to dismiss, the complaint must “contain facts plausibly showing that [a defendant] specifically intended [a third party] to infringe the [patent] and knew that the [third party’s] acts constituted infringement.” *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012). In its motion to dismiss, Comcast Cable explained that the first amended complaint failed to adequately allege induced infringement because it did not plausibly plead specific intent to induce third-party infringement of the asserted patent and because it did not plead that Comcast Cable had knowledge that any third-party act constituted direct infringement. D.I. 30 § V.B.3. Progme’s second amended complaint is equally defective.

Progme’s second amended complaint nowhere uses the word “intent” and nowhere alleges a single fact that could somehow support an allegation that Comcast Cable specifically intended NBCU – the supposed direct infringer – to

[3] Progme’s first amended complaint also failed to identify a third-party direct infringer, which is a requirement for pleading indirect infringement. D.I. 30 § V.B.1. Although Progme’s allegations are still unclear, it apparently tried to correct this defect in its second amended complaint by accusing NBCU as the direct infringer. *See* D.I. 36 ¶¶ 61, 89, 97, 105, 113. Progme apparently claims that Comcast Cable is an indirect infringer. *See* Mot. § 2.B-C; *see also* D.I. 38 at 3 (“Progme alleges that NBCU is the direct infringer . . . .”).

infringe. And nowhere does the second amended complaint allege that Comcast Cable knew that any act by NBCU constituted infringement.

The paragraphs that Progme points to as supposedly satisfying the specific-intent pleading requirements are paragraphs 61, 89, 97, 105, and 113. Mot. at 6. But these paragraphs were not amended in any relevant way and therefore are irrelevant to Progme's Motion. In any event, they are already addressed in Comcast Cable's pending motion to dismiss, and they merely allege Comcast Cable's supposed direction and control of NBCU.

Despite Progme's contention, Comcast Cable's supposed direction and control of NBCU is not "circumstantial evidence" of specific intent to infringe. Mot at 6. Progme is conflating two distinct legal theories. "Direction or control" is a legal doctrine holding that a party may be liable for *direct* infringement of a claim even if it alone does not meet all elements of the claim so long as it directs or controls a third party with respect to the remaining elements. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015). But this *direct* infringement has nothing to do with inducing infringement. A party is liable for such direct infringement even if it knows nothing about the patent and even if it never intended to infringe in the first place.

As explained, inducing infringement, on the other hand, requires a showing of specific intent to cause another to infringe. And because Progme's second amended complaint fails to allege a single fact demonstrating such intent, it remains defective.

3. Regarding contributory infringement, Progme's second amended complaint, like the first, fails to plead that any "component" of a patented invention was unsuitable for substantial non-infringing use.

Progme's second amended complaint fails to correct the defects in the previous complaints' contributory-infringement allegations. In its pending motion to dismiss, Comcast Cable explained that Progme's first amended complaint failed to allege that any "component" of any patented invention was unsuitable for "substantial non-infringing use" as required under 35 U.S.C. § 271(c). Progme's second amended complaint still fails to include such an allegation.

The only new paragraph that Progme points to in its second amended complaint is paragraph 36, which states that "[i]n said cable television delivery system, said PrintWriter has no acceptable, non-infringing substitute for generating said print() and println() statements of the PrintWriter method." Mot. at 6. This paragraph, however, does not refer to any Comcast Cable component as being unsuitable for substantial non-infringing use. Instead, it is in a section of the complaint titled "U.S. Patent No. 8,713,425" that provides a general overview of the patent. That section nowhere even refers to Comcast Cable's cable television network, let alone any specific component thereof.

In addition, paragraph 36 does not even recite the correct standard for contributory infringement. It states that the PrintWriter has no "acceptable, non-infringing substitute," whereas the relevant contributory infringement element requires that a component be unsuitable for "substantial non-infringing use." Progme appears to be confusing the standard for a patentee to prove entitlement to lost profits with the standard for contributory infringement. *See National Research Laboratories v. Eppert Oil Co., Inc.*, 104 F. Supp. 2d 851, 857 (S.D. Ohio 2000) ("The Panduit [lost profits] test requires that a patentee establish: . . . (2) absence of acceptable non-infringing substitutes . . . ."). But merely because computer code has no non-infringing substitute (the lost-profits factor alleged in Progme's second amended complaint) does not have anything to do with whether code has substantial non-infringing use (the contributory-infringement element not alleged in Progme's complaint).

Because the contributory infringement allegations in Progme's second amended complaint are still defective, Progme's Motion should be denied.

4. As to the willful-infringement allegation, Progme's second amended complaint, like the first, fails to plead pre-suit knowledge of the asserted patent.

In its pending motion to dismiss, Comcast Cable explained that Progme failed to adequately plead that Comcast Cable had pre-suit knowledge of the asserted '425 patent, a requirement to plausibly plead willful infringement. D.I. 30 § V.C. Progme's second amended complaint does not correct this defect, and

Progme does not argue otherwise in its Motion. Instead, Progme's argument as to Comcast Cable's supposed prior knowledge of the asserted patent is with respect to indirect infringement. Mot. at 7-8.

In any event, as explained above, the only amendment concerning alleged prior knowledge is paragraph 123, which claims that Comcast Cable received actual notice of the '425 patent from service of Progme's first amended complaint. Notice from service of a complaint, however, is insufficient to plausibly plead willful infringement. "In order to plead that a party has willfully infringed a patent, the party must have had knowledge of the patent; and post-filing knowledge is not sufficient to support such a claim." *Addiction & Detoxification Inst.*, 2014 WL 3819349, at *2. Progme's reference to Comcast Cable's post-filing notice of the asserted patent in paragraph 123 is insufficient to support a willful infringement claim, and therefore, the Court should deny Progme's Motion.[4]

5. Progme's second amended complaint fails to provide a more definite statement.

Progme's second amended complaint is also futile because, despite Progme's contention, it does not provide the more definite statement that Comcast Cable requested in its pending motion to dismiss. Mot. § 2.D. In that motion,

[4] In section V.A.1 above, Comcast Cable addressed the other paragraphs of the second amended complaint that Progme relies on to contend that it properly alleged knowledge for inducement – the paragraphs that were identical to those of the first amended complaint.

Comcast Cable asked the Court to dismiss, or alternatively, order Progme to submit a more definite statement as to the instrumentalities at issue in counts III-VI of its first amended complaint. D.I. 30 § V.D-E.

Progme's second amended complaint, however, provides no further clarification as to counts III-VI. As shown in Exhibit B, the only changes that Progme made in the sections directed to those counts were the deletion of some of the asserted claims, the addition of NBCU as the alleged direct infringer, and the addition or deletion of other minor and irrelevant words or phrases. Progme made no attempt whatsoever to clarify the specific portions of Comcast Cable's cable television network that it contends infringe.

The portions of the second amended complaint upon which Progme relies do not demonstrate otherwise. *See* Mot. at 9-10 (citing paragraphs 35, 36, 45, 49-53, 55-59, 60, 61, 62-74, 77-79, 82, 85-90, 93-98, 101-106, and 109-114). Although paragraph 35, which is in the section titled "U.S. Patent No. 8,713,425," generally discusses a "java virtual machine," it does not mention how, where, when, or even if Comcast uses one in its specific cable television network.

Next, Progme seems to have cited paragraphs 36, 45, 49-53, 55-59, 60, 61, 62-74, 77-79, and 82 by mistake. Paragraph 36, which simply refers to PrintWriter code as having "no acceptable, non-infringing substitute," does not mention any specific Comcast Cable product. And paragraphs 45, 49-53, 55-59, 60, 61, 62-74, 77-79, and 82 do not even relate to counts III-VI; they relate to counts I-II.

As to paragraphs 85-89, 93-97, 101-105, and 109-113, Progme added or omitted irrelevant words or phrases, named NBCU as the direct infringer, and/or fixed typographical errors. Similarly, paragraphs 90, 98, 106, and 114 were amended to remove some of the previously-identified claims that Progme accused Comcast Cable of infringing and apparently to fix typographical errors. None of these paragraphs clarify, however, what specific Comcast Cable product, system, or instrumentalities are accused of infringement.

The other remaining paragraphs that Progme identifies (*i.e.*, paragraphs 46, 49, and 55-58) were not even amended; they are the same as in the first amended complaint. Therefore, Progme's claim that these paragraphs provide a more definite statement is simply false. Indeed, Progme's second amended complaint does not come close to providing the definite statement that Comcast Cable requests. Like Progme's prior complaints, it is still so "vague" and "ambiguous" that Comcast Cable would not reasonably be able to prepare an answer. Fed. R. Civ. P. 12(e). As a result of this and the other defects mentioned above, Progme's proposed amendments would be futile.

B. Progme's Motion should be denied because of its repeated failure to cure defects that Comcast Cable and Comcast Corporation previously identified.

Progme should be precluded from filing its second amended complaint because of its repeated failure to cure defects in prior amendments despite that Comcast Cable and, previously, Comcast Corporation collectively identified those defects on multiple occasions.

Specifically, Progme has had at least three opportunities to cure the obvious defects in its complaints, and yet it repeatedly failed to do so. *Compare Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001) (affirming denial of motion to amend in view of fact that Court allowed plaintiff to amend once previously, but plaintiff failed to do so). Even before Comcast Corporation filed its motion to dismiss, its counsel advised Progme that its original complaint was defective. Ex. A ¶ 2. Yet, Progme refused to fix it. *Id.* ¶ 3. The Court gave Progme another opportunity to cure its defective pleadings after Comcast Corporation filed its motion to dismiss, granting it leave to file an amended complaint. D.I. 10. Progme ignored that opportunity as well, instead amending its complaint only to add new defendants without fixing the other defects. D.I. 11. Even then, Comcast Cable gave Progme a chance to fix its pleadings before filing its own motion to dismiss. And once again, Progme rejected that offer, waited until Comcast Cable moved to dismiss, and then filed the present Motion. These repeated failures to cure the defects are alone a basis for this Court to deny Progme's Motion, and they additionally demonstrate the futility of Progme's second amended complaint.

VI. CONCLUSION

Accordingly, the Court should deny Progme's request for leave under Rule 15(a)(2). Not only would Progme's second amended complaint be futile, but Progme has repeatedly failed to cure its pleading defects in prior amendments. For each of these reasons, Progme's Motion should be denied and it should be precluded from filing its second amended complaint.

Dated: April 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, the foregoing COMCAST CABLE COMMUNICATIONS, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT was filed using the Court's CM/ECF, which will send notice of the filing via electronic mail to all counsel of record designated to receive such notice.

/s/ Thomas J. Tallerico